Docket No. HHD-CV22-6154934-S

SAGE STEELE, Plaintiff, v. ESPN PRODUCTIONS, INC. and THE WALT DISNEY COMPANY, Defendants.	SUPERIOR COURT JUDICIAL DISTRICT OF HARTFORD AT HARTFORD June 16, 2022

MEMORANDUM OF LAW IN SUPPORT OF SPECIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT (CONN. GEN. STAT. § 52-196A)

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I. PRELIMINARY STATEMENT.

Sage Steele (a current employee of ESPN Productions, Inc.), has sued ESPN for conduct she claims is tortious and breaches her contract.[1] However, those torts and breaches are all squarely grounded in ESPN's exercise of its right to free speech.[2] As we demonstrate below, Steele's entire complaint violates Connecticut's anti-SLAPP and must be dismissed.

Steele is one of ESPN's most popular sportscasters. She is a co-host for ESPN's flagship show *SportsCenter*. She has covered, and continues to cover, major events and tournaments for ESPN, including, most recently, the PGA Championship and Masters Tournaments. She is, by all accounts, an excellent journalist.

On September 13, 2021, Steele appeared on former NFL Pro Bowl quarterback and reality television star Jay Cutler's podcast "Uncut with Jay Cutler."[3] During the course of that interview, Steele made three comments: one of which the public perceived as racist, one of which the public perceived as sexist, and the other of which disparaged her employer ESPN.[4]

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[1] Steele also named ESPN's ultimate corporate parent The Walt Disney Company ("TWDC") as a defendant. However, TWDC is simultaneously filing a motion to dismiss for lack of personal jurisdiction and is therefore not joining ESPN's Anti-SLAPP motion.

[2] ESPN treats the facts of Steele's Complaint as true for the purposes of this motion only.

[3] *Sage Steele Talks About Her Start at ESPN, Hating Notre Dame, Rude Men in Sports Media, Social Media Attacks and Mandatory COVID Vaccines on Uncut with Jay Cutler*, PODCASTONE (Sept. 29, 2021) (available at https://www.podcastone.com/episode/Sage-Steele-talks-about-her-start-at-ESPN-hating-Notre-Dame-rude-men-in-sports-media-social-media-attacks-and-mandatory-COVID-vaccines-on-Uncut-with-Jay-Cutler). A true and accurate transcript of this interview was filed herewith as Attachment A.

[4] In her interview with Cutler, Steele opined that women journalists are harassed because of what they choose to wear, Barack Obama is not really black because his black father did not raise him, and that the Company made a "sick" decision in following the accepted science and requiring its employees to be vaccinated against COVID 19. Att. A, at 22:7–19, 43:22–44:16, and 50:12–21.

According to Steele, when her interview went live on September 29, 2021, "media coverage erupted." Compl. ¶ 21. "[R]eports slammed Steele . . . calling her comments 'appalling,' 'awful,' 'bonkers,' and 'nasty.'" *Id.*, ¶ 22. ESPN responded by exercising its business judgment and taking appropriate and reasonable steps to quell the firestorm Steele sparked.

On April 27, 2022, Steele filed her complaint for unlawful retaliation in violation of Conn. Gen. Stat. § 31-51q,[5] intentional and negligent infliction of emotional distress, and breach of contract. She argues ESPN unlawfully disciplined her and acted outrageously when it removed her from broadcasts, took away prime assignments, allowed her colleague Ryan Clark to forgo appearing with her, and forced her to "publicly apologize" under the "threat of losing her job" as on-air talent. Compl. ¶¶ 32, 41, 55. 24, 28. She also complains Laura Gentile told attendees at the ESPNW Summit "that ESPN had 'elected' to have Steele 'sit this one out' as a result of her comments." *Id.*, ¶34. And she alleges that, after ESPN issued its own statement explaining it would address the controversy internally, ESPN failed to rebut reports it suspended Steele as punishment and did not publicly respond to comments fellow *SportsCenter* anchor Nicole Briscoe posted that were critical of Steele. *Id.*, ¶¶ 32, 43, 55.

All of those claims are predicated on ESPN's protected communications and conduct. ESPN's creation and broadcast of shows qualifies as protected speech. Removing Steele from broadcasts, allowing her co-workers to forgo appearing with her, and allegedly conditioning her return to those broadcasts on her issuing an apology are casting decisions that are considered conduct furthering ESPN's protected expression. Likewise, ESPN's public statement that it would handle any issues with Steele internally and privately constitutes protected speech that subsequently protects all conduct in furtherance of that communication, including ESPN's decision not to correct any misinterpretations of ESPN's response or

[5] Her sixth count for declaratory relief is derivative of her Section 31-51q claim.

publicly address Briscoe's tweets. ESPN's communications and conduct were made via television stations or publicly accessible websites; *i.e.* public forums. And all the underlying communications concerned issues related either to the creation of audiovisual programming or Steele (who is, by her own admission a public figure); *i.e.* matters of public concern. As Steele cannot show that she will prevail on any of her claims, particularly in the face of ESPN's First Amendment defense, the Complaint must be dismissed in its entirety.

II. LEGAL STANDARD

Connecticut's Anti-SLAPP statute permits a special motion to dismiss whenever "a party files a complaint . . . based on the opposing party's exercise of its right of free speech." Conn. Gen. Stat. § 52-196a(b). Under that statute, "free speech" covers (1) any communication, "or conduct furthering communication," (2) made "in a public forum" (3) "on a matter of public concern;" such as "issues relat[ing] to" a "public figure" or "an audiovisual work." *Id.*, § (a)(1)–(2). The statute mandates the dismissal of any claims predicated on protected speech or conduct if the plaintiff fails to establish probable cause of prevailing on those claims. *Id.* § (e)(3).[6]

III. ANY CLAIM PREDICATED ON ESPN'S PROTECTED SPEECH MUST BE DISMISSED

There is no merit to Steele's claims that ESPN violated Section 31-51q, or unlawfully caused her emotional distress (either intentionally or negligently), when it allegedly (i) removed her from certain

[6] "[S]eparate counts of a complaint, rather than the entire complaint, may be appropriately dismissed." *Baity v. Mickley-Gomez*, 2020 Conn. Super. LEXIS 1890, at *21–22 (Super. Ct. Dec. 14, 2020). Courts can even parse out and dismiss distinct claims within a cause of action because refusing "to permit anti-SLAPP motions to reach distinct claims within pleaded counts undermines the central purpose of the statute: screening out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery." *Baral v. Schnitt*, 1 Cal. 5th 376, 392 (2016); *see also Balla v. Hall*, 59 Cal. App. 5th 652, 672 (2021) (noting that, under California law, "an anti-SLAPP motion [can also] attack portions of causes of action"). Further, Connecticut's Practice Book empowers this Court to enter judgment as to part of a claim. Conn. Practice Book § 17-51.

broadcasts in light of the controversy she created; (ii) respected an offended colleague's request not to work with her; (iii) explained why she was not attending an ESPN hosted and broadcast event in light of that controversy; (iv) conditioned her return to work on an apology for offending her co-workers and creating a controversy that negatively impacted ESPN; and (v) declined to publicly comment on internal personnel matters. As demonstrated below, Steele's claims run afoul of Connecticut's anti-SLAPP statute. All of the statements and acts about which Steele complains constitute communications or conduct in furtherance of those communications that occurred in a public forum and relate to either a public figure or an audiovisual work. And because there is no probable cause that Steele will prevail on any of these claims, they all must be dismissed.

A. ESPN Was Engaged In Protected Communications and Conduct In Furtherance of those Communications

The law is clear that "[t]he creation of a television show is an exercise of free speech." *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143 (2011).[7] "Steps taken to advance such constitutionally protected expression," such as ESPN choosing whom it wants to appear on the shows and events it broadcasts, or what its employees will say on them, "are properly considered 'conduct in furtherance of' the exercise of the right of free speech." *Musero v. Creative Artists Agency, LLC*, 72 Cal. App. 5th 802, 816 (2021); *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019) ("[V]ideos are a form of speech that [are] entitled to First Amendment protection," as are "decisions about the footage and dialogue to include").

[7] "Given the sparse precedent interpreting Connecticut's newly enacted anti-SLAPP statute," this Court may look "to decisions from other jurisdictions with similar laws, ***particularly California***, for guidance." *Quevedo v. Hearst Corp.*, 2019 Conn. Super. LEXIS 3478, at *12 n.2 (Super. Ct. Dec. 19, 2019) (emphasis added). After all, "California's anti-SLAPP statute is extremely similar to Connecticut's anti-SLAPP statute." *Cevetillo v. Lang*, 2019 Conn. Super. LEXIS 3353, at *10 n.7 (Super. Ct. Dec. 13, 2019). And "California's anti-SLAPP statute is broad in scope, like the Connecticut statute." *Graves v. Chronicle Printing Co.*, 2018 Conn. Super. LEXIS 3795, at *14 n.5 (Super. Ct. Nov. 7, 2018).

All but one of ESPN's allegedly wrongful acts constitute conduct furthering its communication pursuant to Connecticut's anti-SLAPP statute.[8] Removing Steele from broadcasts (Compl., ¶¶ 27, 55), allegedly taking her off prime assignments *(Id.* ¶¶ 34, 55), and permitting Ryan Clark to "refuse[] to appear on air with Steele because of her comments" (*Id.*, ¶41) are all "essentially casting decisions regarding who was to report" on ESPN's broadcasts. *Hunter v. CBS Broad. Inc.*, 221 Cal. App. 4th 1510, 1521 (2013). And the law is clear that casting decisions qualify as "acts in furtherance of" ESPN's communication. *Id.*; *see also Symmonds v. Mahoney*, 31 Cal. App. 5th 1096, 1106 (2019); *Claybrooks v. ABC, Inc.*, 898 F. Supp. 2d 986, 993 (M.D. Tenn. 2012) ("[C]asting decisions are part and parcel of the creative process behind a television program.").

Likewise, assuming *arguendo* that ESPN forced Steele to issue an apology "under threat of losing her job" as she claims (Compl., ¶¶ 10–12, 27–28), that still constitutes a casting decision and is conduct furthering communication.[9] ESPN has the right to decide who to put on the air. And it can require its talent meet certain conditions, such as publicly apologizing before they are allowed on the-air; especially when their presence would otherwise distract from the subject of the broadcast. *Claybrooks*, 898 F. Supp. 2d at 1000 ("[T]he First Amendment protects the right of the producers of" shows "to craft and control" their content and messaging "based on whatever considerations the producers wish to take into account").

As Steele notes, ESPN followed-up her apology with the following statement:

> "At ESPN, we embrace different points of view - dialogue and discussion makes this place great. That said, we expect that those points of view be

[8] Laura Gentile's alleged remarks at the espnW Summit qualify as a "communication" under Connecticut's Anti-SLAPP statute. Compl., ¶34.

[9] For "anti-SLAPP purposes [the] gravamen [of plaintiff's cause of action] is defined by the acts on which liability is based."*Contreras v. Dowling*, 5 Cal. App. 5th 394, 407 (2016). Courts considering such motions "must examine the allegedly wrongful conduct itself, without particular heed to the form of action within which it has been framed." *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 671(2005). And they should not "reward artful pleading by ignoring [covered] claims if they are mixed with assertions of unprotected activity." *Baral*, 1 Cal. 5th at 393 (2016).

> expressed respectfully, in a manner consistent with our values, and in line with our internal policies. We are having direct conversations with Sage and those conversations will remain private."[10]

ESPN's message was clear: employees were expected to communicate their views respectfully and any issues related to Steele would be addressed internally and privately. ESPN's subsequent refusal to publicly respond to (1) reports it suspended Steele for her comments and (2) "comments made by Briscoe" about Steele and the controversy were in furtherance of that message. Compl., ¶¶ 32, 43.[11]

Accordingly, as "[t]he 'overall thrust' of the complaint challenged" ESPN's decisions about who to put on the air and statements it made regarding Steele's conduct, her claims arise from ESPN's speech. *Baharian-Mehr v. Smith*, 189 Cal. App. 4th 265, 273 (2010).

B. ESPN's Protected Communications and Conduct In Furtherance Of Those Communications Occurred In Public Forums

Although Connecticut's anti-SLAPP law does not define "public forum" its drafters intended it cover television stations.[12] Courts inside and outside of the state also agree that television stations are public forums for anti-SLAPP purposes. *See, e.g.*, *Lawrence v. Chambers*, 2020 Conn. Super. LEXIS 1060, at *5 (Super. Ct. Sep. 21, 2020) ("[T]elevision station[s] are public forums."); *Belen v. Ryan Seacrest Prods., LLC*, 65 Cal. App. 5th 1145, 1158 (2021) (holding that broadcasting a show "on a cable-TV network to hundreds of thousands, if not millions, of viewers . . . qualifies as dissemination in . . . a

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[10] Chris Rosvoglou, *ESPN Host Apologizes For What She Said On Podcast*, THE SPUN BY SPORTSILLUSTRATED (Oct. 5, 2021) (*available at* https://thespun.com/top-stories/sage-steele-apologizes-for-what-she-said-on-podcast).

[11] The First Amendment protects both ESPN's "right to speak freely" *and* ESPN's "right to refrain from speaking" about issues concerning Steele. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018) (quotation omitted); *Telescope Media Grp.*, 936 F.3d at 753 (explaining a government "compels speech when it passes a law that has the effect of foisting a third party's message on a speaker").

[12] As Senator Kissel explained, legislatures chose to pursue passing anti-SLAPP legislation after hearing "from television stations, journalist[s]," and "newspapers." Conn. Gen. Assemb., Senate Session Transcript for June 1, 2017.

public forum"). Thus, the casting decisions at the root of Steele's Complaint (*i.e.* removing Steele from broadcasts, taking away prime assignments, refusing to return Steele to the air until she apologized, and permitting Clark to forgo appearing with Steele) occurred in the public forum of ESPN's television stations.

Gentile's alleged comments were also made via a public forum. She was addressing "hundreds of attendees (including media) as well as the tens of thousands of" viewers watching the 2021 espnW Summit livestreamed on ESPN's publicly accessible website. *Cole v. Patricia A. Meyer & Assocs., APC*, 206 Cal. App. 4th 1095, 1121 (2012) ("An Internet Web site that is accessible to the general public is a public forum."); *Noble v. Hennessey*, 2021 Conn. Super. LEXIS 87, at *8 (Super. Ct. Jan. 12, 2021) ("Internet sources have . . . been held to be a public forum for anti-SLAPP purposes.").

Finally, ESPN provided its statement on the Steele controversy directly to various outlets that then published it on publicly accessible websites.[13] *See Annette F. v. Sharon S.*, 119 Cal. App. 4th 1146, 1161 (2004) (holding statements provided to "a news publication" were "'made in a . . . public forum'") (citation omitted); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4 (2006) ("Web sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP statute."); *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1252 (2017) ("[S]tatements made during" an "interview meet" the "public forum requirement"); *Avalos v. Rodriguez*, 2020 Cal. App. Unpub. LEXIS 6489, at *11 (Oct. 5, 2020) ("[T]he online news websites where" plaintiff's "statements were published were undoubtedly public fora"). As

[13] *See, e.g.*, Chris Rosvoglou, *ESPN Host Apologizes For What She Said On Podcast*, THE SPUN BY SPORTSILLUSTRATED (Oct. 5, 2021) (*available at* https://thespun.com/top-stories/sage-steele-apologizes-for-what-she-said-on-podcast); Leah Asmelash, *ESPN's Sage Steele apologizes for controversial comments about Obama's racial identity and vaccine mandates*, CNN (Oct. 6, 2021) (*available at* https://www.cnn.com/2021/10/06/entertainment/sage-steele-espn-comments-cec/index.html); Joe Hernandez, *ESPN anchor Sage Steele is off the air after her comments on vaccines and Obama*, NATIONAL PUBLIC RADIO (Oct. 6, 2021) (*available at* https://www.npr.org/2021/10/06/1043680295/espn-sage-steele-vaccines-obama?ft=nprml&f=1043680295).

explained above, its subsequent refusal to comment publicly about Steele, the perception ESPN suspended her, or Briscoe's tweets constitute conduct furthering that message.

C. All Of The Conduct And Statements In Which Steele Roots Her Complaint Address Matters Of Public Concern

Connecticut's Anti-SLAPP law defines "'[m]atter of public concern'" as including any "issue related to" either "an audiovisual work" or "a public official or public figure." Conn. Gen. Stat. § 52-196a (a)(1). The shows and events ESPN broadcasts are "audiovisual work[s]." Steele's lawsuit is thus designed to punish ESPN for conduct furthering communication (*i.e.* casting decisions like removing her from broadcasts and prime assignments, conditioning her return to air on her apologizing, and allowing Clark to forgo appearing with her on its shows), via a public forum (*i.e.* ESPN's television stations), on a matter of public concern (*i.e.* the "audiovisual" shows and events it broadcasts).

As for the remaining forms of protected expression on which Steele bases her claims, all concern issues relating to a public figure—Sage Steele. She describes herself as "one of ESPN's most popular sportscasters," and thus, by her own admission, is a public figure. Compl. ¶ 12; *see Celle v. Filipino Reporter Enters., Inc.*, 209 F.3d 163, 177 (2d Cir. 2000) (plaintiff's "own characterization of himself as a 'well known radio commentator' within the Metropolitan Filipino-American community" showed "that he is a public figure"); *Baiul v. Disson*, 607 F. App'x 18, 20 (2d Cir. 2015) (plaintiff's statements that she is "'a superstar in the world of figure skating,' and a 'global entertainer'" made her a public figure). Alternatively and, at a minimum, Steele is a public figure as to the "public controversy" in which she "voluntarily inject[ed]" herself: the media firestorm her comments on "Uncut with Jay Cutler" admittedly ignited. *Gertz v. Robert Welch*, 418 U.S. 323, 351 (1974).

IV. STEELE CANNOT PREVAIL ON ANY OF HER CLAIMS

As demonstrated above, Steele's claims arise from ESPN's exercise of free speech. To defeat ESPN's motion, Steele must "demonstrate[] . . . that there is probable cause" she will "prevail on the merits," despite "all valid defenses." Conn. Gen. Stat. §§ 52-196a(e)(3). Steele cannot meet that burden.

A. The First Amendment Bars Steele's Tort Claims

Steele's claims for unlawful retaliation in violation of Conn. Gen. Stat. § 31-51q, and for intentional and negligent infliction of emotional distress, are all tort claims. *Gunn v. Penske Auto. Grp., Inc.*, 2020 U.S. Dist. LEXIS 163212, at *5 (D. Conn. Sep. 8, 2020) (explaining "Conn. Gen. Stat. § 31-51q is, in essence, . . . a statutorily created tort derived from the action for wrongful discharge").

The First Amendment serves as a complete defense to state tort suits where, as here, the claims are based on constitutionally protected speech or conduct. *Snyder v. Phelps*, 562 U.S. 443, 451 (2011);[14] *see also Claybrooks*, 898 F. Supp. 2d at 1000*; Gleason v. Smolinski*, 319 Conn. 394, 406 (2015) ("[T]he [f]irst [a]mendment bars . . . damages under the generally applicable laws of intentional and negligent infliction of emotional distress where those claims are based on constitutionally protected conduct."); *Telescope Media Grp.*, 936 F.3d at 747–55 (explaining that a Minnesota law guaranteeing the "full and equal enjoyment of public accommodations and services" to its citizens, regardless of their sexual orientation, did not require a videographer to produce videos of same-sex wedding as "[e]ven antidiscrimination laws, as critically important as they are, must yield to" the videographer's "First Amendment" right to free speech). And, as demonstrated above, Steele's entire action is rooted acts, statements, and omissions that ESPN's right to free speech protects.

[14] *See also State v. Moulton*, 310 Conn. 337, 341 n.3 (2013) ("The first amendment prohibition against laws abridging the freedom of speech is made applicable to the states through the due process clause."); U.S. Const. art. VI, cl. 2 (establishing that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the "supreme Law of the Land").

B. Steele's Section 31-51q Claim Is Factually And Legally Deficient

Steele's section 31-51q claim also fails for two additional reasons. First, ESPN is not liable under Section 31-51q because Steele's comments "substantially or materially interfere[d] with" Steele's job performance and her working relationship with ESPN. Conn. Gen. Stat. § 31-51q. Second, none of ESPN's alleged conduct amounts to "discipline" under the statute.

1. Steele Admits Her Interview Both Harmed ESPN And Caused Workplace Tension.

Steele's interview with Cutler ignited a media firestorm directed no only at Steele, but at ESPN as well. For example, many of the ensuing articles and stories show did not reference Sage Steele individually. Rather, she was identified as ***ESPN's*** Sage Steele.[15] And such coverage confirms that those critiques and criticisms targeted both her *and* ESPN.

In addition to harming ESPN's reputation, Steele admits that her comments also caused a significant strain at work. *Schumann v. Dianon Sys.*, 304 Conn. 585, 623–24 (2012) (explaining any disruption an employee's speech had on her relationships with co-workers, her job performance, and her responsibilities within the company is relevant to this analysis). Steele was told her "coworkers were

[15] *See, e.g.*, Jon Jackson, *What Did ESPN's Sage Steele Say About Barack Obama, Women That Has Her Facing Backlash?*, NEWSWEEK (Oct. 5, 2021) (*available at* https://www.newsweek.com/what-did-espns-sage-steele-say-about-barack-obama-women-that-has-her-facing-backlash-1635873); Rajesh Khanna, *ESPN's Sage Steele dragged on Twitter for saying Obama's Black father was 'nowhere around'*, RECENTLYHEARD (Oct. 4, 2021) (*available at* https://recentlyheard.com/2021/10/04/espns-sage-steele-dragged-on-twitter-for-saying-obamas-black-father-was-nowhere-around/); Sean Keeley, *ESPN's Sage Steele going viral over comments regarding Obama's black father*, AWFUL ANNOUNCING (Oct. 3, 2021) (*available at* https://awfulannouncing.com/espn/sages-steele-obama-father-black-census-race.html); Ny MaGee, *ESPN's Sage Steele Calls Biden's Vaccine Mandates 'Sick'*, EurWeb (Sept. 30, 2021) (*available at* https://eurweb.com/2021/09/30/espns-sage-steele-calls-bidens-vaccine-mandates-sick/); Taryn Ryder, *ESPN's Sage Steele calls company's COVID vaccine mandate 'sick' and 'scary': 'I didn't want to do it'*, YAHOO NEWS (Sept. 29, 2021) (*available at* https://news.yahoo.com/espn-sage-steele-company-covid-vaccine-mandate-sick-173914356.html); Joseph A. Wulfson, *ESPN's Sage Steele slams network's 'sick,' 'scary' vaccine mandate, says she got the shot before deadline*, FOX NEWS (Sept. 28, 2021) (*available at* https://www.foxnews.com/media/espn-sage-steele-sick-scary-vaccine-mandate).

'hurt' by her comments on the podcast." Compl. ¶ 33. She notes her "fellow *SportsCenter* anchor Nicole Briscoe retweeted a post from someone who said she hoped ESPN no longer uses Ms. Steele to cover women's sporting events." *Id.*, ¶ 38. And she claims "ESPN NFL analyst Ryan Clark refused to appear on air with Steele because of her comments." *Id.*, ¶ 41. Any argument she has that her comments "did not interfere with [her] working relationship with" ESPN is thus immediately "contradicted by [her] allegations;" all of which "necessarily impl[y]" that her "expressions of opinion did interfere with [her] relationship with" ESPN. *Cotto v. United Techs. Corp., Sikorsky Aircraft Div.*, 48 Conn. App. 618, 625 n.10 (1998).

The evidence supports that Steele's conduct disrupted her professional relationships. For example, Steele was scheduled to interview Halle Berry at the 2021 espnW summit. Affidavit of Stacey Pressman in Support of ESPN's Special Motion to Dismiss ("Pressman Aff."), ¶ 2. However, the public relations team associated with Berry would not let her sit for that interview because of the controversy Steele's comments created. *Id.*, ¶ 4. And the organizers for the V Foundation fundraiser asked ESPN to take Steele off the event because they perceived her comments about the COVID-19 Vaccine as "anti-science," and the Foundation's mission is to raise funds for cancer research. Affidavit of Norby Williamson in Support of ESPN's Special Motion to Dismiss ("Williamson Aff."), ¶ 2.

In sum, because Steele's allegations in the complaint together with ESPN's foregoing evidence confirm that Steele's comments impacted both her job performance and working relationship with ESPN. Steele therefore cannot meet her burden of demonstrating probable cause she will prevail on her Section 31-51q claim.

2. **ESPN'S Actions Do Not Qualify As "Discipline" Under Section 31-51q.**

Steele's 31-51q claim also fails regardless of whether she is bound by her admission that her comments materially impacted her job and relationship with ESPN (as well as the evidence supporting

such a finding). Section 31-51q only protects an employee from retaliatory "discipline or discharge." Conn. Gen. Stat. § 31-51q. "Other forms of adverse employment actions do not suffice for a § 31-51q claim." *Callahan v. Hum. Res.*, 2022 U.S. Dist. LEXIS 27189, at *7 (D. Conn. Feb. 14, 2022). Since Steele remains an ESPN employee, to prevail on her claim, she must prove the Company disciplined her, which she cannot do.

"Under section 31-51q, the term 'discipline' contemplates 'an affirmative act of deprivation that diminishes the status or happiness of the recipient.'" *Brown v. Office of State Comptroller*, 211 F. Supp. 3d 455, 479 (D. Conn. 2016) (citation omitted). Neither having Steele apologize nor remaining silent while the media and her colleagues criticized her constitute "affirmative act[s] of deprivation." *Id.* The former required Steele take an affirmative act; it neither deprived her of a benefit of her employment, nor "negatively affect[ed] the terms or conditions of her employment in the future." *Id.* As for the latter, Steele's comments upset several of her colleagues. She may be unhappy that her co-workers disliked what she said, but "personality conflicts at work that generate antipathy and snubbing by . . . co-workers will not meet th[e] standard" for discipline. *Charron v. Town of Griswold*, 2009 Conn. Super. LEXIS 3399, at *37 (Super. Ct. Dec. 14, 2009). Nor will behavior that allegedly "isolate[s]" an employee "from her colleagues." *Brown*, 211 F. Supp. 3d at 479 (holding such behavior does not rise "to the level of discipline or discharge as contemplated by the Connecticut courts").

Likewise, removing Steele from on-air appearances and assignments does not constitute an "affirmative act of deprivation" because denying "something that neither" she nor ESPN "agreed to in the contract . . . cannot amount to discipline or discharge." *Edwards v. E. Conn. State Univ.*, 2017 Conn. Super. LEXIS 4993, at *13 (Super. Ct. Nov. 21, 2017); Compl., ¶ 55. Steele's contract is unambiguous: ESPN is not obligated to use her for any particular assignment. Affidavit of Rosetta Ellis in Support of ESPN's Special Motion to Dismiss ("Ellis Aff."), ¶¶ 4, 7, Ex. A, at ¶ 9. Its obligation is to pay her,

regardless of whether or not it assigned her to an event or used her on its broadcasts. *Id*. ESPN never stopped paying Steele, and Steele does not claim otherwise.

In sum, while Steele may have preferred to appear on-air earlier, or keep all of her assignments, discipline does not encompass "'a failure to enhance [an employee's] status or happiness.'" *Brown*, 211 F. Supp. 3d at 479.

C. Steele's Also Cannot Show Probable Cause She Will Prevail On Either Of Her Emotional Distress Claims

1. Connecticut Law Bars Steele From Premising A Negligent Infliction Of Emotional Distress Claim On Conduct That Occurred During Her Employment With ESPN.

There is no dispute that all of the alleged acts underlying Steele's claim for Negligent Infliction of Emotion Distress occurred during Steele's employment. It is well-settled that "negligent infliction of emotional distress in the employment context arises **only** when it is 'based upon unreasonable conduct of the defendant in the termination process.'" *Parsons v. United Techs. Corp.*, 243 Conn. 66, 88 (1997) (*quoting Morris v. Hartford Courant Co.*, 200 Conn. 676, 682 (1986) (emphasis added)). Liability for the tort thus cannot arise "out of conduct occurring within a continuing employment context, as distinguished from conduct occurring in the termination of employment." *Perodeau v. City of Hartford*, 259 Conn. 729, 762–63 (2002).[16] As Connecticut's Supreme Court explained nearly two decades ago, "the societal costs of allowing" employees to pursue "claims for negligent infliction of emotional distress" that arose during their employment "are unacceptably high." *Id.*, 762. Emotional distress is, after all, "simply an

[16] Though *Perodeau* involved a negligence claim brought by a municipal employee against a municipal employer, "the court's analysis was not limited to this context." *Kachorowsky v. People's Bank*, 2002 Conn. Super. LEXIS 3281, *4–5. Rather, multiple courts within the state "have applied its holding to preclude claims of negligent infliction of emotional distress brought against private employers." *Dawkins v. Metallurgical Processing, Inc.*, 2002 Conn. Super. LEXIS 3596, at *19 (Super. Ct. Sep. 18, 2002) (collecting cases); *Morrissey v. Yale Univ.*, 48 Conn. Supp. 394, 396 (2003) (rejecting argument "that *Perodeau* is inapplicable to cases involving private employers").

unavoidable part of being employed." *Id.*, 757. Steele remains an ESPN employee and there is no contrary allegation in the Complaint.

Steele's NIED claim also fails because ESPN responded reasonably to the controversy Steele created. *Hall v. Bergman*, 296 Conn. 169, 182 n.8 (2010) ("To prevail on a claim of negligent infliction of distress, the plaintiff is required to prove that . . . the defendant's conduct created an unreasonable risk of causing the plaintiff emotional distress."). Steele and ESPN were criticized in countless articles and posts. In response, ESPN temporarily removed Steele from broadcasts and certain assignments until that negative attention died down. Williamson Aff., ¶¶ 3–4. And ESPN made a reasonable business judgment to refrain from any further comments on the controversy Steele created to avoid reigniting it.

2. **Steele Also Cannot Premise An Intentional Infliction Of Emotional Distress Claim On ESPN's Routine Employment Actions Or Her Personality Conflicts With Her Co-Workers.**

Steele's claim for Intentional Infliction of Emotional Distress fares no better. As Steele admits, her comments about the harassment implications for women based on their attire, President Obama's bi-racial identity, and her personal opposition to ESPN's internal policy requiring vaccination sparked a media firestorm. Compl., ¶¶ 15–23. She roots her entire IIED claim on ESPN's response to that controversy. *Id.*, ¶¶ 74–77. But "[i]t is the intent to cause injury that is the gravamen of the tort." *DeLaurentis v. New Haven*, 220 Conn. 225, 267 (1991) (quotation omitted). And there is nothing in the Complaint that even remotely suggests that ESPN intended to hurt Steeles rather than quell the raging blaze of criticism. In any event, none of Steele's allegations come close to meeting the stringent standard on an IIED claim that ESPN's actions constituted "extreme and outrageous conduct 'exceed[ing] *all bounds* usually tolerated by decent society." *Bell v. Bd. of Educ.*, 55 Conn. App. 400, 410 (1999) (citation omitted).

Most are routine employment actions, and "routine employment action, even if taken because of improper motivations, does not constitute extreme or outrageous behavior." *Stoffan v. S. New Eng. Tel. Co.*, 4 F. Supp. 3d 364, 378 (D. Conn. 2014). ESPN's alleged "decision[] based on [its] business needs and desires" to have Steele apologize before she returned to broadcasts is nothing more than "routine employment-related conduct." *Perodeau*, 259 Conn. at 757. Likewise, Steele's allegations that ESPN disciplined her by sidelining her and removing her from prime assignments are equally infirm because . "disciplinary warnings, demotions, [and] changed work assignments" are all routine employment actions. *Joiner v. Chartwells*, 2005 U.S. Dist. LEXIS 38388, at *12 (D. Conn. Dec. 20, 2005). It is settled law that routine employment actions cannot "give rise to a claim for the intentional infliction of emotional distress." *Id.*; *see also Jeffress v. Yale Univ.*, 1997 Conn. Super. LEXIS 2321, at *5–6 (Super. Ct. Aug. 28, 1997) ("[A]llegations" that plaintiff's "duties and responsibilities were reduced" fell "far short of the requisite level of extreme and outrageous conduct"). That ESPN allegedly took those actions "without conducting even the barest investigation into her statements" changes nothing. Compl., ¶ 76. "[S]ubjecting an employee to discipline without proper investigation" is still "a far cry from . . . extreme and outrageous conduct." *Tracy v. New Milford Pub. Sch.*, 101 Conn. App. 560, 568 (2007) (quotation omitted).

Finally, the alleged comments and actions of Steele's co-workers are "personality conflicts" that the courts consider to be one of the many "vicissitudes of employment" an employee should reasonably expect to encounter at work. *Perodeau v. City of Hartford*, 259 Conn. 729, 757 (2002). As courts have explained, "insults, verbal taunts, threats, indignities, annoyances, petty oppressions or conduct that displays bad manners or results in hurt feelings do not support a claim for intentional infliction of emotional distress." *Miner*, 126 F. Supp. 2d at 195.

Accordingly, Steele has not identified any "behaviors that a reasonable fact finder could find to be extreme or outrageous.*Strano v. Azzinaro*, 188 Conn. App. 183, 188 (2019) (explaining when "assessing a claim for intentional infliction of emotional distress, the court performs a gatekeeper function").

D. ESPN's Only Contractual Obligation Is To Pay Steele's Salary, And Steele Cannot Use The Implied Covenant Of Good Faith Or Fair Dealing To Create New Terms

All that remains are the claims arising out of ESPN's contractual relationship with Steele. Although Steele claims that ESPN's response to the Steele/Cutler controversy breached both her contract and the implied covenant of good faith and fair dealing, she has failed to identify any such breach. Nor can she. As explained above, ESPN is not required to use her services; it is only required to pay her salary. Ellis Aff., ¶¶ 4, 7, Ex. A, at ¶ 9. As long as it does, ESPN "ha[s] completely fulfilled its obligations." *Id.* Steele does not claim that ESPN ever failed to pay her, and thus there can be no breach.

Steele also cannot rely on the implied covenant of good faith and fair dealing "to achieve a result contrary to the clearly expressed terms of a contract." *Geysen v. Securitas Sec. Servs. USA, Inc.*, 322 Conn. 385, 399 n.11 (2016) (quotation omitted). Rather, she must tie her claim "to an alleged breach of a specific contract term[;]" typically "one that allows for discretion on the part of the party alleged to have violated the duty." *D2E Holdings, LLC v. Corp. for Urban Home Ownership of New Haven*, 212 Conn. App. 694, 703 (2022) (quotation omitted). Something she cannot do, given (again) ESPN's only obligation under the contract is to pay Steele's salary. As such, her claim ESPN violated the implied covenant of good faith and fair dealing also fails.

V. CONCLUSION

Steele claims ESPN removed her from broadcasts, took away prime assignments, refused to return her to either until she apologized. She alleges it allowed Clark to refuse to appear on a show with her and Gentile to tell thousands of viewers that ESPN "elected" to omit Steele from the 2021 espnW Summit

because of her comments. She asserts ESPN's choice to forgo commenting on articles reporting it suspended her for her remarks or responding to Briscoe's tweets after issuing its own statement on the controversy was retaliatory.

All of these acts are (1) communications, or constitute conduct furthering communication, (2) made through a public forum, (3) concerning issues related to ESPN's broadcasts ("audiovisual work[s]") or Steele (a public figure). All thus qualify as protected speech under Connecticut's Anti-SLAPP law. Steele cannot premise any of her claims—which are all meritless—on that protected speech. Accordingly, for the foregoing reasons, ESPN requests that this Court dismiss Steele's complaint in its entirety; or, alternatively, dismiss those portions of it Steele premised on ESPN's protected speech.[17]

Respectfully submitted,

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[17] ESPN also requests that this Court award its "costs and reasonable attorney's fees." Conn. Gen. Stat. § 52-196a(f)(1).

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2022, a true and correct copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF SPECIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT (CONN. GEN. STAT. § 52-196a) was sent by ELECTRONIC MAIL ONLY to:

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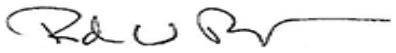

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